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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/059,080	01/30/2002	Edward O. Kenaschuk	80694-502	5731

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ADE & COMPANY
1700-360 MAIN STREET
WINNIPEG, MB R3C3Z3
CANADA

EXAMINER

MCELWAIN, ELIZABETH F

ART UNIT	PAPER NUMBER
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1638

DATE MAILED: 05/10/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/059,080

Applicant(s)

KENASCHUK, EDWARD O.

Examiner

Elizabeth F. McElwain

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 February 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9, 13 and 15-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 3, 6-8, 13 and 17-19 is/are allowed.
- 6) ☒ Claim(s) 1, 2, 9-12 and 14-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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The amendments filed February 12, 2004 and February 20, 2004 have been entered.

Claims 1-9 and 13 have been amended.

Claims 15-19 are newly submitted.

Claims 1-9, 13 and 15-19 are pending and are examined in the present office action.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Rejections that are not restated in the present office action have been withdrawn.

The specification is still objected to for the inclusion of tables on numbered pages after the claims and abstract. The tables should be provided on pages that are part of the specification prior to the claims. Alternatively, these pages could be cancelled and the tables could be submitted as drawings, and as drawings would require a written description of each drawing in the specification. Correction is required.

Claims 1-5, 9 and 15-16, are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for the flax cultivar M5791 with seeds having greater than 70% linolenic acid but not more than 73% linolenic acid, that is flax cultivar M5791 or a progeny of M5791 does not reasonably provide enablement for any flax cultivar having greater than 70% linolenic acid. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to the invention commensurate in scope with these claims, as stated in the last office action.

Applicant's arguments and the affidavit of Kenaschuk filed February 12, 2004 have been fully considered but they are not persuasive. Applicants assert that the rejection should be withdrawn given that the affidavit of Kenaschuk shows that the crosses described in Figure 4 produced many flax lines having a linolenic acid content above 70% and when these cultivars were crossed with other non-high linolenic acid cultivars some progeny had linolenic acid above 70%. Applicants also argue that there is precedence in other U. S. Patents for similar claims.

The Examiner maintains that applicants have produced high linolenic acid flax that has at least 70% linolenic acid but not more 80% linolenic acid. In addition, while the affidavit of Kenaschuk teaches that multiple flax cultivars were produced that have between 70-80% linolenic acid, all of these cultivars were produced using the same parent varieties. Applicants have not taught a method that would allow those skilled in the art to produce flax having greater than 70% linolenic acid other than by performing the same crosses using the same parental cultivars. In addition, applicants have not taught producing any flax cultivars having greater than 80% linolenic acid. The specification fails to provide guidance with regard to choosing other parent varieties that will produce high linolenic acid flax. Therefore, it would require undue experimentation by one skilled in the art to identify other parent varieties that would result in crosses that would produce flax having greater than 70% linolenic acid, and particularly greater than 80% linolenic acid. In addition, the deposit of said parent varieties would be required to enable a claim drawn to flax produced by crossing particular parent varieties. Furthermore, regarding the patents cited by applicants as precedence for their claim

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language, each application is examined on its own merits. The patents cited each were deemed to have allowable claims based on all the facts of the case, which includes that in some cases the claims are drawn to oil, not to plants or seeds, and in others the claims recite ranges of percent fatty acids, for example.

Claims 3, 6-8, 13 and 17-19 are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

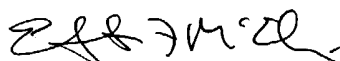
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth F. McElwain whose telephone number is (571) 272-0802. The examiner can normally be reached on increased flex time.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Amy Nelson can be reached on (571) 272-0804. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Elizabeth F. McElwain, Ph.D.

Primary Examiner

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EFM